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BEFORE THE

FEDERAL MARITIME COMMISSION

Docket No. 11-12

HANJIN SHIPPING CO., LTD.;
KAWASAKI KISEN KAISHA, LTD.;
NIPPON YUSEN KAISHA;
UNITED ARAB SHIPPING COMPANY (S.A.G.); and
YANG MING MARINE TRANSPORT CORPORATION,

COMPLAINANTS

v.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

RESPONDENT

REPLY TO RESPONDENT'S OPPOSITION TO COMPLAINANTS' MOTION FOR JUDGMENT

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Preliminary Statement

This is a simple case: Respondent is charging vessel operating common carriers a fee and giving no actual service in return for that fee. The Port seeks salvation in a travelling discovery circus featuring "benefits" in all three rings. "Generalized benefits" with no reasonable relation to fees charged were rejected by the Commission in *Louis Dreyfus Corp. v. Plaquemines Port Harbor and Terminal District,* 25 FMC 59, 69 (1982) ("The charges are not based on the actual use of the Port service by the charged parties.")

The Opposition steers a zig-zag course trying to avoid the various rocks and shoals barring a finding that the CFC harbor tax is lawful under 46 U.S.C. § 41102(c). The Port has an impossible task: justifying its extraction of money from container vessel operators by threatening cutoff of terminal services, while giving nothing concrete or specific in return. Although the extraction of the CFC is an unreasonable practice for various reasons peculiar to the terms of the Port "Tariff," and because the charge is not linked to services, the foremost issue is whether extraction of such a charge from Complainants on penalty of barring private terminals from providing cargo handling to Complainants is a reasonable port practice.

Moreover, the Port hoisted itself when it cited the 1975 D.C. Circuit decision in *Indiana Port Commission v. Bethlehem Steel Corp,* 521 F.2d 281 (D.C. Cir. 1975) (Opp. at 20). The Port failed to address the subsequent FMC decision on remand and its D.C. Circuit affirmance, as well as related cases. On remand in *Bethlehem Steel,* FMC found that a charge like the CFC, imposed to recover port construction charges, had to be stricken from the Port "Tariff" because it did not relate to "receiving, handling, storing and delivering cargo," hence it did not come under the Act. 21 F.M.C. 629, 633 (1979); *Bethlehem Steel* Corp. *v. FMC*, 642 F.2d. 1215 (D.C. Cir. 1980).

The CFC occupies a legal "no man's land." Under *Bethlehem Steel*, it has no place in the Port "Tariff" because its alleged justification is amortizing Express Rail facility construction, local road projects, and funding security – not receiving, handling, storing or delivering cargo. It is not charged as port or harbor dues under an authorizing federal statute; charges allegedly for amortizing land-side facilities have no legal niche or authority.[1] The only issue left standing under *Bethlehem Steel* is whether the extortion of the CFC by Port threats against private terminals to make them stop serving Complainants' vessels is an unreasonable practice in violation of section 41102(c). Alternatively, if it were further analyzed, the CFC itself violates the Act for numerous reasons Complainants have explained.

The Port's "Tariff" actually is a voluntarily-published marine terminal operator rate schedule under the Act, however; the CFC is not a proper subject of such a rate schedule. This case concerns primarily "Tariff," Section H, which contains no rates in exchange for services; it simply announces the CFC. There is no support framework in the Shipping Act or Commission Regulations for a Port Authority to collect for anything but maritime terminal services to "cargo or vessel." *See generally*, 46 C.F.R. pt. 525. The Port now concedes it does not furnish services

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[1] The Port seeks to lure the Commission into overstepping its legal bounds and usurping Congress' role to review and approve new types of Port fees Under federal law, local Port fees may exist only within in highly structured legal framework The Tonnage Clause of the Constitution states that "[n]o State shall, without the Consent of Congress, lay any Duty of Tonnage." This requirement for Congressional approval extends to charges on shipowners, cargoes, vessel capacity, or anything else *Polar Tankers, Inc. v. City of Valdez*, 129 S Ct 2277, 2282-83, reh'g denied, 130 S. Ct 31 (2009). Congress has exercised this power, specifying by statute exactly what narrow types of port fees are permitted to be adopted by non-federal entities.

33 USC 5(b), adopted at the urging of House T&I Chairman Don Young in 2002, states that no taxes, tolls, operating charges, fees, or any other impositions whatever shall be levied upon or collected from any vessel or other water craft, or from its passengers or crew, by any non-Federal interest, if the vessel or water craft is operating on any navigable waters, except for two categories - (1) reasonable fees charged on a fair and equitable basis that are used solely to pay the cost of a service to the vessel or water craft, or (2) port or harbor dues charged under 33 USC 2236. The CFC clearly does not qualify under either, as there is no service to a vessel, and section 2236 requires that port or harbor dues may be levied only in conjunction with a harbor navigation project So, the Port is seeking to simply depart from the congressionally mandated framework, and it seeks the Commission's complicity in blazing an entirely new extra-statutory trail

to Complainants' container vessels of the sort enumerated in 46 CFR 525.1, but rather provides only general benefits in and around the Port ("provision and maintenance of facilities, infrastructure, roadways and intermodal transportation network, as well as security.") See Reply to Response to Complainants' Statement of Facts not in Dispute (RRSOF) at ¶7. Hence, under 46 C.F.R. pt. 525, *Bethlehem Steel* and other FMC cases, the CFC has no place in a "Tariff."

The issue Complainants have squarely put before the Presiding Officer is whether the Port can extract a charge from vessels without furnishing an identifiable service in return. The Port would eliminate the clear difference between "service" and "benefit" as recognized in *Dreyfus*, trying to justify its crusade for irrelevant discovery of "benefits" to whole company families. Complainants therefore must belabor the obvious: A "service" is an activity which benefits a particular person or group in some way. Thus, police protection is a "service" to those whom it protects, giving them a "benefit." Facilities whose use is totally discretionary, like Express Rail, are not a "service" to those who choose not to use them. Only a user charge can possibly be commensurate with their benefit, because historical usage is meaningless. Express Rail, like Amtrak, is only a "service" to its users: neither one is a "service" to drivers who enjoy lighter traffic although it may "benefit" them in some way because it reduces traffic. The court and Commission decisions discussed *infra* clearly recognize the plain and obvious difference.

The Port's tiresome labeling of the CFC as a "user fee" does not make it so: it is a tax triggered by cargo handling (i.e., vessel loading and unloading) by the private terminals, the revenues of which are spent as the Port chooses, with no *quid pro quo* in the form of any Port service to the vessel for that particular charge. Complainants' may use no Port-operated facility but the water they cruise. The vessels' containers only use Express Rail if and when the vessel operators so choose. Their containers may never see Express Rail and may be moved over the roads solely by shippers and consignees. Containerships may never route their containers via

Express Rail, and they may increase, decrease or eliminate container delivery by truck. The CFC, however, never varies, as it has no link to usage of any service.

Regardless of whether a vessel's containers ever transit the Port's Express Rail facility, the Port claims the right to sweep CFC money taken from that vessel's operators into its general fund, supposedly to amortize Express Rail, fund roads, and cover security costs. The Port's repeated mischaracterization of the CFC as a "user fee," is fakery: it is just a dressed-up facility assessment extracted under duress with no consideration in return. Under the *Indiana Port* case and its remand, the level of the CFC in comparison to "benefits" is not even a subject of Commission jurisdiction, because it has no connection with cargo handling. But the extraction of it using a fatally flawed "Tariff," on pain of forcing private terminal cutoff of cargo handling services, clearly is subject to the Act and is an unreasonable practice under section 41102(c).

Myriad "benefits," which are enjoyed by all vessels entering the Port to use a private terminal and by many other groups of Port users as, have no status under the Act. The right of the Port to charge a vessel for general, public "benefits" would have to be grounded in contract, implied or express — but none exists. Conceding that the CFC charge to vessels rests only on "benefits" from facilities the vessels and their containers may not even use, the Port has run out of sea room. RRSOF at ¶114-119. Its dictatorial interference with terminal handling of vessels' containers is in stark violation of section 41102(c).

The following are reliable navigation aids under section 41102(c):

1. All court and Commission cases require that a marine terminal operator render some identifiable service to the paying party in exchange for a charge. Only then are "benefits" from that service measured for reasonableness against the charge. The service, of course, can consist of use of a facility, such as a wharf, crane or elevator.

2. Section H is not a lawful tariff or rate schedule, only a wish list, because there is no service rendered in return for the CFC. The CFC is properly a harbor toll charge, a facility assessment, or a tax against the vessel and its appurtenances (containers) perforce paid by their operators like every other vessel charge. The CFC has no place

in the "Tariff" under the *Bethlehem Steel* D.C. Circuit and FMC decisions and their brethren.

3. The Port's bogus "Tariff" has no legal basis to obligate the vessel (or its operators) to pay for steaming in and tying up at private container terminals for container handling, or to duplicate the ro/ro wharfage charge.

4. The Port furnishes no "CFC service," so there is no marine terminal implied contract for the CFC. Contract, express or implied, must support a charge, and there is no contract with the Port concerning transit of the harbor to reach leased terminals. There is no consideration flowing to Complainants in return for the CFC, so there is no contractual obligation to pay it, implied or express: the CFC is an unvarnished toll which is obviously outside the Act. If the Port wants to have a user charge for security, it can do that and the charge will have to pass muster under section 41102(c).

5. The non-payment penalty is an effective, unlawful blockade threat, an unreasonable method of gouging money from vessel operators. This is true even if we assume (for the purposes of this motion) that the practice of unloading "compliant carriers'" cargo from a vessel while leaving "non-compliant carriers'" cargo onboard would be possible and could occur. RRSOF at ¶37.

6. The CFC is a charge against the ocean common carrier. Containers are vessel appurtenances fundamental to container vessel operations. It is the vessel which loads and discharges: containers do not handle themselves and vessel operators cannot be found on the dock hustling containers.

7. As the Port recognized internally, the CFC is not a user fee, but a tax with no close nexus between a service rendered and the benefit conferred. RRSOF at ¶87.

8. The "Tariff," by its own terms, does not apply at leased terminals, per Subrule 34-080, hence its blockade setup is invalid for this reason.

9. The CFC does not apply to Complainants because they are not "users" of Port "cargo handling services," per Subrule 34-1220(1)(e). Again, the blockade has no legitimate basis.

10. Any penalty for non-payment is an unreasonable practice, but cutting off container handling is well beyond the pale. It is a stratagem to deprive vessel operators of an opportunity to challenge the CFC in court collection actions.

11. The Port responded in discovery that CFC payments "are not earmarked for particular expenditures," so the CFC receipts have no direct nexus to any individual benefit or service to their payors, so their reasonableness could not be assessed if they were subject to the Act.

12. There is no court or Commission case under section 17 of the Act or its successor, section 41102(c), which has held a charge lawful except as a user charge paid for a

particular service rendered to, or particular facility usage by, the group of persons charged. Common "benefits" have no standing at all as the basis for charges.

The Port's "Background"

The Port hits the nail square when it references (Opp. at 3) as CFC justification "major infrastructure projects at the port for the benefit of the users of the port." If this is true, all "users of the port" should pay: that is Complainants' and the Commission's stated position under section 41102(c); an erstwhile "marine terminal operator" may not select vessel operators to be force-fed a charge which is not channeled to fund any marine terminal service or facility used by the vessel operators. Legislation would be required to allow a Port Authority to levy a tax on vessels for doing what ports must do — maintain and improve their facilities. See *Indiana Port Commission*, 521 F.2d 281 (D.C. Cir. 1975).

The Port's Cases and Their Brethren

No Port case supports lawfulness of a charge to a party receiving no service in return, despite the Port's artful plastic surgery on some of its quotes. Then there is the primary problem that one of the Port's cases and related cases hold harbor charges, like the CFC, to be outside Commission jurisdiction. Nevertheless, we review various cases cited in the Opposition and related cases.

1. *Indiana Port Commission*, 521 F.2d 281 (D.C. Cir. 1975). The Port may possibly consider this opinion to be a hole card, employing a misrepresentation of the opinion. (Opp. at 20). The facts were that the Indiana Port Commission ("IPC") billed all vessels entering its harbor an entry fee. The FMC held that was an unreasonable practice violating section 17.

The D. C. Circuit discussed benefits to vessels from Port harbor construction, but made no pronouncement on any basis for a Port harbor charge. 521 F.2d at 286. It remanded only for Commission consideration of "the parties contribution to the construction of the Harbor (and their contract understanding with regard to same)." 521 F.2d at 287. Judge Wilkey

distinguished between construction of harbor facilities for which a harbor charge was levied, and construction of pier facilities for cargo handling, making no comment whatsoever on the Shipping Act implications of charging vessels for entering the harbor. 521 F.2d at 285. But, the FMC did so on remand.

Judge Wilkey also said in *Indiana Port Commission* that there is no benefit conferred by a port's performing its necessary functions:

> The FMC found that 'the expenditures incurred by the Port Commission in administering the Harbor as a 'public port' . . .' really involve nothing more than expenditures relative to the operation of the public terminal facilities. Therefore, it reasonably concluded that such expenditures provided no benefit to vessels using just the Harbor.

521 F.2d at 287.

The FMC decision on remand, in *Bethlehem Steel*, knocks Section H out of the "Tariff" and evaluation of the level of CFC itself out of this case. The Indiana Port Commission, like Respondent, conceded it provided no services to Bethlehem Steel vessels docking at Bethlehem's facilities, but argued it "confers benefits on every vessel entering the harbor."

The FMC dismissed the case for lack of jurisdiction because the Harbor Service Charge was unrelated to cargo handling, therefore not within the scope of receiving, handling, storing and delivering of cargo. The Harbor Service charge was found to be based on the navigational aspect of the Charge, *i.e.*, recovering the cost of harbor construction. *Bethlehem Steel Corp. v. Indiana Port Commission*, 18 S.R.R. 1485, 1490-1491 (FMC 1979). The CFC is mainly based on recovering the cost of constructing Express Rail, according to the Port.

2. The FMC on remand in *Bethlehem Steel* reiterated the D.C. Circuit's point that the charge was levied to recoup "investment in the construction of the Harbor," thus "there is insufficient relation between the harbor charge and the receiving, handling, storing or delivering of property. It is inappropriate, therefore, to consider the reasonableness of the charge under

section 17" (at 633). The CFC, then, has no status under the Shipping Act because it purports to exist to recoup investment in Express Rail roads and security. But, the interference of the Port in cargo handling by private terminals by the instrumentality of the so-called "Tariff" is a rank violation of section 41102(c) because, as the Commission in *Bethlehem Steel* pointed out, the terminal-related aspects of the "Tariff" are subject to the Act. 21 F.M.C. at 632. Commission cases have consistently found jurisdiction over such activities, as in *Dreyfus*.

The Port's investment in Express Rail or in its roads, which the Port offers as justification for the CFC assessment, cannot be amortized by a "service charge" only on vessels. The Port recovers its investment in the cargo-handling facilities at the terminal via its lease payments from the private terminals, so it cannot claim that the CFC is a charge for amortizing those facilities. The Port was correct in recovering its Express Rail investment by a user fee, the CRF, which would come within the Act. This CFC assessment is related to the Express Rail facility only in the Port's mind, not in reality, but, even if its proceeds do fund amortization of Express Rail, it is still not a subject of the Shipping Act.

3. *Dreyfus*, 21 S.R.R. 1072. *Dreyfus* sets out the Commission's theory of section 17 jurisdiction. "Control" over terminal services gives jurisdiction.

> An entity need not directly or physically provide terminal services to be deemed an 'other person' subject to the Act. The holdings in several terminal lease cases support the proposition that it is the control of terminal rates and practices which constitutes "furnishing" terminal facilities and confers Commission jurisdiction. 9/ Conditioning access to a port's private facilities upon the payment of a charge for governmental services reflects significant threshold control over terminal facilities.

21 S.R.R. at 1080.

Dreyfus (at 1081) looked to "the underlying purpose and justification for the Port's charges" to access jurisdiction, and Express Rail user charges qualify. What does not qualify under the principles of *Indiana Port Commission*, *Bethlehem Steel* and *Dreyfus* is a *charge to*

amortize a facility regardless of whether the person charged ever uses that facility in real life. This inherent vice of the CFC both ousts Shipping Act jurisdiction over it, and condemns it as an unreasonable practice but for the jurisdictional lacuna.

> Complainants have also made a prima facie showing under Section 17 that the charges do not bear a reasonable relationship to the comparative benefit obtained from the Port services by the assessed parties. 17/ The charged parties have not received benefits from the Port's services proportionate to the costs allocated to them. Moreover, other users of the services obtain equal or greater benefits and have not been shown to have paid their allocable share of Port costs. The charges are not based upon actual use of the Port services by the charged parties. Even if the "generalized benefit" concept advanced by the Port were acceptable it appears that the exempted users obtain the same generalized benefit as the charged parties.
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> While there need not be a precise correlation between "marine related" costs allocated to the Port by the Parish and the classes of Port users assessed fees, they must be reasonably related. Here, there is a broad basis for determining "marine related" costs and a narrow class of Port users assessed those costs.

Dreyfus, 21 S.R.R. at 1082.

4. In *Puerto Rico Ports Authority v. Federal Maritime Commission*, 919 F.2d 799 (1st Cir. 1990), the First Circuit ruled that the Commission improperly asserted jurisdiction over the Puerto Rico Ports Authority's ("PRPA's") collection of harbor service fees at the Port of Ponce, collected for general services provided by the PRPA. Vessels were assessed the charge based on their gross tonnage. 919 F.2d at 801. The First Circuit found that the charges were related to "navigation within the harbor" and "not related to the receiving, handling, storing or delivering of property (at 804)." The First Circuit went on to compare the instant charge with that of the harbor fee that the Commission found outside Commission subject matter jurisdiction in the *Indiana Port Commission* case and announced that both harbor fees were strictly "navigational" and not "terminal" services.

5. In *Jacksonville Maritime Association, Inc. v. The City of Jacksonville*, 22 S.R.R. 1287 (FMC 1984), the Commission concluded that a "user fee" assessed against vessels anchored in storage, and not handling cargo, did not control access to terminal facilities. Therefore, the Commission ruled in *Jacksonville Maritime Association* that the user fee, levied against the vessel interests, was not subject to Commission jurisdiction. 22 S.R.R. at 1289.

6. *West Gulf Maritime Assoc. v. Port of Houston*, 18 S.R.R. 783, 790 (1978) (Opp. at 18). *West Gulf* held only that a port can hold vessel owners' agents responsible for wharfage charges. 18 S.R.R. at 787. It held, "wharfage was an appropriate charge against the vessel interests," and "it is reasonable for vessel interests to be made primarily liable as users of the service," or "jointly liable with the cargo interests who are likewise users of the service." 18 S.R.R. at 790. Complainants obviously do not dispute charging wharfage for actual use of a wharf. The opinion does not support levying a Port tax on vessel interests because some common facilities and services may (or may not) be used by vessels.

7. *Volkswagenwerk*. The Port misrepresented a quote by truncation (Opp. at 18). The Court truly said: "The proper inquiry under §17 is, in a word, whether the charge levied is reasonably related to **the service rendered.**" (Emphasis added). 390 U.S. at 282. Relative benefits to vessel operators from common Port services and facilities are irrelevant; the point is there is no Port service to vessels, and there is no charge to cargo, stevedores, truckers, or anyone else who shares the Port infrastructure (which may or may not benefit from the CFC monies). *Volkswagenwerk* nowhere offers that a charge be measured in the alternative against either a service or benefit — as the Port contends. (Opp. at 19-20). The *Volkswagenwerk Court* quoted with approval the FMC decision in *Evans Cooperage*:

> But the Commission looked beyond "substantial benefits" to the relationship between the service and the charge:

> The [Commission of the Port of New Orleans] has made a charge to help defray its costs of operating facilities as measured by cargo handled in the area and the only question is whether its facilities are being used and the commission is performing a service reasonably related to its charges.

390 U.S. at 281, n.33.

8. *Baton Rouge Marine Contractors, Inc. v. Fed. Maritime Comm'n, 655 F.2d 1210* (D.C. Cir. 1981). This is another user charge case. *Baton Rouge* involved an MTO's tariff item for a "use of services and facilities charge," particularly use of an "automated shipping gallery" at a grain elevator, assessed against stevedores. The D.C. Circuit reversed a Commission finding that a loading charge "was reasonably related to services [the MTO] provided to stevedores." 655 F.2d at 1213. Over and over, the court repeated the focus to be whether "the charge levied is reasonably related to the service rendered," the *Volkswagenwerk* standard. The D.C. Circuit remanded because "the FMC has inadequately explained its current appraisal of the benefit to stevedores from the productivity increase provided by the automated shipping gallery." 655 F.2d at 1215.

The Court failed the Commission's approval of the charge "given the absence of any explanation of the relative benefits . . . to stevedores and other segments of the distribution channel." *Id.* at 1217. The CFC, on the other hand, is forced on vessels with no allocation to any other segment of the shipping community which uses the common Port facilities, and no Port service used by the vessels.

9. *Evans Cooperage* involved a tariff Wharf Tollage Charge **assessed against cargo per ton**. (6 F.M.B. 415, 416). The Examiner found that both the barge delivering the cargo to a vessel and the cargo receive substantial benefits from services and facilities provided, so the "only question is whether its [Port's] facilities are being used and the Commission (Port) is performing a service reasonably related to its charges." (6 F.M.B. 418-419).

10. *Philippine Merchants Steamship* involved MTO charges against vessels for various services; and FMC said "so long as these charges are reasonably related to the cost of service they are proper in amount." (9 F.M.C. 155, 165 (1965)). Also, although a carrier may "benefit" from a service, it must be of a kind that justifies a charge against the carrier. (9 F.M.C. 166).

11. *James J. Flanagan Shipping Corporation d/b/a/ James J. Flanagan Stevedores v. Lake Charles Harbor and Terminal District and Lake Charles Stevedores, Inc.*, 27 S.R.R. 1123 (FMC 1997). In *Flanagan*, the Commission was not directly concerned with whether the Commission could exercise jurisdiction over a port's assessment of supplemental rail car switching charges and pallet use charges. Rather, the Commission was concerned with whether the port's imposition of such charges on the complainant stevedore was reasonable and proper. If the complainant was not a user of the services for which charges were assessed and derived, no allocable benefit from the port's services provided in connection with the charges, the imposition of such charges against the complainant would violate the Shipping Act.

The Commission determined that the rail switching service occurred during a time prior to the complainant stevedore's "involvement in the movement of the cargo....." *Id.* at 1131. Although the port argued that switching benefited Flanagan by placing the cargo closer to the vessel, the Commission rejected those arguments as too general in nature and saying, that those "are the sort of benefits that accrue from the business as a whole. Under [respondents'] rationale, one could assign to stevedores benefits from nearly anything that assists the general flow of cargo to the Port. Such an allocation of benefits and expenses is not consistent with Commission case law." *Id.* at 1132, emphasis supplied.

The Commission determined that the terminal's provision of switching services directly benefited the cargo, but that such benefit occurred prior to the time the complainant took

possession of the cargo. Therefore, the Commission ruled that the terminal's practice was unreasonable because the charge should have been assessed against the cargo interests, rather than the stevedore. Accordingly, the Commission ruled that the terminal engaged in an unreasonable practice by improperly assessing the switching charge against an entity not availing itself of the service.

The Summary Judgment Standard

McKenna Trucking[2] reviewed the rules on summary judgment, which condemn the Port's attempt to bog this case down with discovery machinations (Opp. at 17, 24). There being no FMC subject matter jurisdiction over the CFC itself under *Bethlehem Steel* and *Dreyfus* because it is not a charge for a service, the *McKenna* ruling deferring summary judgment pending conclusion of limited discovery is useless to the Port. 27 S.R.R. at 1056. However, its careful instruction regarding summary judgment is valuable. The CFC is nullified by *Bethlehem Steel* as a charge in a marine terminal operator rate schedule; it should be in and of itself out of the case on jurisdictional grounds, which per *McKenna* must be decided "at the outset." *Id.* at 1054. But, there remains for decision evaluation of the Port's forced extraction of the CFC from Complainants under the terms of a mock "Tariff."

The excuse for the Port to drag this case out and wear Complainants down melts away when the *McKenna* teachings are applied. The Port's point (Opp. at n.24) that cases hold "challenging a fee under sec. 41102(c) requires a more extensive factual record than exists here" is gone with the wind when there is no jurisdiction over the fee and no fee to the user of a service or facility. The buck stops here. The "expert" opinions on the CFC "benefits" are left dangling. The Port can twist and turn, jiggle and dance, but it admits it gives no service to those who pay the CFC, so the CFC does not belong in the rate schedule, has no status under the Shipping Act,

[2] *McKenna Trucking Co., Inc v A P Moller-Maersk Line,* 27 S.R.R. 1045 (FMC June 23, 1997).

and "benefits" to the Port's public from facilities or services related to the CFC in the Port's collective mind cannot justify the CFC.

Judge Kline made the following observations in *McKenna*:

> As discussed above, according to the trilogy of 1986 Supreme Court decisions, a nonmovant, such as McKenna Trucking in the instant case, must proffer some type of substantial evidence showing support for each essential element of its claim under substantive law and its claim must be based upon a plausible legal theory in order to withstand respondents' motion for summary judgment when, as here, respondents' motion is supported by affidavits and has a plausible basis. Furthermore, even if there is some factual dispute, the dispute must involve genuine disputes of material fact in order to survive a motion for summary judgment and to proceed into further litigation. In *Anderson v. Liberty Lobby*, cited above, 477 US at 248, the court clarified the meaning of the term "material" facts as follows:
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> > Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.
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> For a dispute to be "genuine," there must be sufficient evidence to permit a reasonable trier of fact to resolve the issue in favor of the nonmoving party. (Case citations omitted). By like token, "material" means that the fact is one that might affect the outcome of the suit under the governing law. (Case citations omitted). 27 S.R.R. at 1052.

On the necessity of deciding jurisdiction, Judge Kline said:

> There is strong authority that federal courts, which also have limited jurisdiction under statutes, should decide their jurisdiction at the outset before proceeding into the merits of a controversy. 27 S.R.R. at 1054.

And, finally:

> If courts find that it is doubtful that a genuine issue of material fact will emerge from complainants' discovery or that the discovery is irrelevant to the issues under the substantive laws involved or that complainants are merely pursuing a "hope" or "hunch" that evidence will emerge eventually at a trial, summary judgment may be issued against complainants. 27 S.R.R. at 1059.

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CONCLUSION

This case is ripe for judgment – that is judgment with no further, pointless discovery on irrelevant "benefits" to the local New York shipping public and Complainants' corporate families. The Port's case is solely dependent on "services" being synonymous with "benefits," and opinion substituting for fact. The parties statements reveal no disputes regarding the material underlying facts whatsoever, only issues of mislabeling. Accordingly, we submit it is time for the Presiding Officer to rule on the issues with clarity.

Respectfully submitted,

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Dated: February 15, 2013